

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHERI AND LEONARD COVERT, husband
and wife,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. CV-04-3070-FVS

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendants' Motion for Summary Judgment, Ct. Rec. 24, and Plaintiffs' Motion to Strike, Ct. Rec. 107. Plaintiffs are represented by Jeffrey Poole. Defendants are represented by James Harmony.

I. BACKGROUND

The following facts are taken from the parties' Statements of Material Facts. Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, the Court deems admitted any fact asserted by a party and not rebutted by the opposing party. Except where otherwise noted, the parties do not dispute any of the facts recited in this section.

On April 27, 2000, the Washington State Department of Social and Health Services ("DSHS") received a report from a school counselor that Leonard Covert had physically abused his biological daughter T.C. and a foster child, L.B., who was living at the home of Leonard and Cheri Covert. It was alleged that Mr. Covert hit his daughter T.C., giving her a black eye, and that Mr. Covert hit L.B. in the back of

1 the head while she was in a kneeling position, knocking her face into
2 the floor and causing a bloody nose. These allegations were
3 investigated¹ by both the Yakima County Sheriff's Department
4 ("Sheriff's Department") and Defendant Michael Grogan from the DSHS,
5 Division of Licensed Resources/Child Protective Services ("DLR/CPS").

6 The criminal investigation resulted in two charges of fourth-
7 degree assault against Mr. Covert and one count of rendering criminal
8 assistance against Mrs. Covert. As part of the criminal investigation
9 and pursuant to a search warrant, the Sheriff's Department obtained
10 from the Covert's home a square of carpet containing L.B.'s blood and
11 towels that were saturated with L.B.'s blood. The Sheriff's
12 Department also obtained pictures of T.C. with a black eye. The
13 criminal charges were ultimately dismissed pursuant to a stipulated
14 continuance subject to the fulfillment of conditions requiring Mr.
15 Covert to address his anger management problem.

16 The CPS investigation resulted in two findings of physical abuse
17 against Mr. Covert and one finding of physical neglect against Mrs.
18 Covert. These findings were based on Mr. Covert's alleged admission
19 to Defendant Grogan that he hit T.C. and caused her black eye. Mr.
20 Covert now contends he "did not assault his daughter T.C.", but it is
21 unclear whether Mr. Covert denies admitting hitting T.C. to Defendant
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24 ¹ Plaintiffs contend that "whether this was truly an
25 'investigation' or was instead part and parcel of the overall
26 wrongful conduct which violated the Covert's protected rights in
[sic] an issue of material fact." *Plaintiffs' Reply to Statement
of Material Facts*, at 3:19-21.

1 Grogan.²

2 During the process of these investigations, the Sheriff's
3 Department took T.C., as well as the Covert's adopted sons, A.C. and
4 J.C., into protective custody of the State. Pursuant to court orders,
5 T.C. and L.B. were removed from the home on April 27, 2000, and A.C.
6 and J.C. were removed on April 29, 2000. Pursuant to the Shelter Care
7 Order, T.C. was placed in relative placement with Sandy Tabor, Mr.
8 Covert's sister. Thereafter, T.C. was found dependent as to Mr. and
9 Mrs. Covert pursuant to two separate agreed orders. On January 9,
10 2001, the dependency action was dismissed and T.C. returned home.
11 A.C. and J.C. were also found dependent pursuant to agreed orders and
12 were placed in licensed foster care pursuant to a court order. The
13 boys returned home after the dependency actions were dismissed on
14 August 4, 2000.

15 Before A.C. and J.C. returned home, Mrs. Covert reported to CPS
16 on May 18, 2000, and May 19, 2000, that she believed A.C. and J.C.
17 were being spanked. Specifically, on May 18, 2000, Defendant Mary
18 Martinez, social worker for the Covert children, received a call from
19 Linda Coleman, Guardian ad Litem for A.C. and J.C., stating that Ms.
20 Covert "reported that the boys are reporting that they are being
21 spanked." This was investigated by CPS but did not result in any
22 violation. On June 6, 2000, Defendant Debra Bond, the new social
23 worker for the Covert children, received a telephone call from Mrs.
24 Covert, inquiring about her boys' behaviors, specifically, "aggression

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26 ² This dispute is not material to the issue before the Court.

1 towards each other, anger, sexual acting out." Mrs. Covert also told
2 Debra Bond: "Now I know something happened to my baby in the first FH
3 [foster home], if he is acting out sexually. You people have really
4 damaged my boys." Further, on July 25, 2000, Mrs. Covert told
5 Defendant Debra Bond that A.C. and J.C. were "being abused more in FC
6 [foster care] than at home." In response to this call, on the same
7 day, Defendant Debra Bond initiated a licensing referral to
8 investigate this incident. An evaluation was conducted, but did not
9 result in any violation.

10 The Plaintiffs' allege that after the Covert children returned
11 home the "State told Ms. Covert that she was a 'target', that if she
12 'shut up' the State would not have done anything, that its actions,
13 including the 'investigation' of and charges against Leonard Covert
14 were part of a 'witch hunt', that the State was 'out to get [Mrs.
15 Covert]', and that the State has now admitted that 'it did not have
16 all the information' that instead would have caused the case to be
17 handled differently."

18 On November 10, 2003, Plaintiffs filed this lawsuit in Washington
19 State Superior Court in Thurston County against the State of
20 Washington, Department of Social and Health Services, and individually
21 named state employees, Debbie Bond, Greg Dootson, Michael Grogan, Lucy
22 Stephens, Janice Jiles, Erika Massett, Tim Abbey, Carlos Carrillo,
23 Alfonso Garcia, Mary Martinez, Carlos Saldivar and Mike Smith
24 (hereinafter the "Defendants"). On February 18, 2004, Plaintiffs
25 dismissed all of their state law claims, leaving only the federal
26 civil rights claims. On March 11, 2004, this case was removed to

1 United States District Court in the Western District of Washington.
2 By stipulation, this matter was transferred to the Eastern District in
3 June 2004. Defendants now move for summary judgment on Plaintiffs'
4 remaining claims alleging civil rights violations under 42 U.S.C.
5 § 1983 and the Washington State Constitution.

6 **II. DISCUSSION**

7 **A. SUMMARY JUDGMENT STANDARD**

8 A moving party is entitled to summary judgment when there are no
9 genuine issues of material fact in dispute and the moving party is
10 entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex*
11 *Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548, 2552 (1986). "A
12 material issue of fact is one that affects the outcome of the
13 litigation and requires a trial to resolve the parties' differing
14 versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306
15 (9th Cir. 1982). Inferences drawn from facts are to be viewed in the
16 light most favorable to the non-moving party, but the non-moving party
17 must do more than show that there is some "metaphysical doubt" as to
18 the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475
19 U.S. 572, 586-87, 106 S.Ct. 1348, 1356 (1986). The non-moving party
20 cannot rely on conclusory allegations alone to create an issue of
21 material fact, *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.
22 1993), and must respond with something more than conclusory
23 allegations, speculation or argumentative assertions that unresolved
24 factual issues exist. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890
25 (9th Cir. 1994). A district court must enter summary judgment against
26 a party who fails to make a showing sufficient to establish and

1 essential element of a claim, even if genuine issues of fact exist
2 regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23,
3 106 S.Ct. 2548. There is no issue for trial "unless there is
4 sufficient evidence favoring the non-moving party for a jury to return
5 a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
6 242, 249, 106 S.Ct. 2505, 2511 (1986). Thus, a mere "scintilla of
7 evidence" in support of the non-moving party's position is
8 insufficient to defeat a motion for summary judgment. *Id.* at 252, 106
9 S.Ct. at 2512.

10 ***B. Eleventh Amendment Immunity***

11 "The Eleventh Amendment bars suits against the State or its
12 agencies for all types of relief, absent unequivocal consent by the
13 state." *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999) (citing
14 *Pennhurst v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79
15 L.Ed.2d 67 (1984)). Here, the State of Washington has not waived its
16 immunity. Further, Plaintiffs acknowledge that the State of
17 Washington and its agencies are immune from suit under 28 U.S.C. §
18 1983. Thus, the Court determines that the State of Washington and the
19 Department of Health and Human Services are dismissed with prejudice
20 as defendants from this action. The Eleventh Amendment also bars the
21 Plaintiffs' remaining claims against the individual defendants in
22 their official capacities. *Romano*, 169 F.3d at 1186. However, the
23 Eleventh Amendment imposes no bar to Plaintiffs' claims against the
24 individual defendants in their personal capacities.

25 ***C. Absolute Immunity***

26 "State actors, including social workers, who perform functions

1 that are critical to the judicial process itself are entitled to
2 absolute immunity." *Doe v. Lebbos*, 348 F.3d 820, 826 (9th Cir. 2003)
3 (citations and quotations omitted). Specifically, social workers are
4 afforded "absolute prosecutorial immunity" for "initiating and
5 pursuing child dependency proceedings, and in seeking and obtaining a
6 court order for the seizure and placement of a newborn child" and
7 "absolute quasi-judicial immunity" in cases where "a child protective
8 services worker ... executes a court order for seizure and placement
9 of a child [.]" *Id.* at 989 (quotations omitted); see e.g., *Doe*, 348
10 F.3d 826 (finding that allegations that social worker failed to
11 investigate possible exculpatory evidence and fabricated evidence in
12 the dependency petitions had the "requisite connection to the judicial
13 process" to be protected by absolute immunity); *Mabe v. San Bernardino*
14 *County Dept's of Public Soc. Servs.*, 237 F.3d 1101, 1109 (9th Cir.
15 2001) (holding, where there were allegations that social workers did
16 not conduct their investigation properly, that the social workers were
17 entitled to absolute immunity because their actions were part of the
18 initiation and pursuit of dependency proceedings). "To the extent,
19 however, that social workers also make discretionary decisions and
20 recommendations that are not functionally similar to prosecutorial or
21 judicial decisions, only qualified, not absolute immunity, is
22 available." *Millie v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003).

23 Here, Plaintiffs' acknowledge Defendants are entitled to absolute
24 immunity for their actions involving the investigation and filing of a
25 dependency action for the Covert children. However, Plaintiffs argue
26 it is the actions of the Defendants relating to the Covert children

1 while they were in the care and custody of the State that violated
2 Plaintiffs' constitutionally protected liberty interest in the
3 companionship of their children. Specifically, Plaintiffs argue their
4 parent-child relationship was damaged by their children's stay in
5 foster care because (1) "the State" told Mrs. Covert that she and her
6 husband were part of a retaliatory "witch hunt" by the State of
7 Washington and their employees and that "the State has now admitted
8 that 'it did not have all the information' that instead would have
9 caused the case to be handled differently", (2) the Defendants ignored
10 and refused to investigate important information provided by Mrs.
11 Covert regarding T.C.'s birth mother and the dangers of placing T.C.
12 in the relative placement with Mr. Covert's sister; and (3) the
13 children were abused and mistreated in foster care.³

14 None of Plaintiffs' allegations are specific to any of the named
15 defendants. Further, no evidence has been presented to assist the
16 Court in determining whether Plaintiffs' claims involve discretionary
17 acts of the Defendants. Therefore, based on the record submitted, the
18 Court cannot determine if the Defendants' actions related to these
19 claims are entitled to absolute immunity.

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22 ³ This list only includes those facts alleged in Plaintiffs'
23 Statement of Material Facts. The Court did not comb through
24 Plaintiffs' affidavits to determine if there were additional
25 facts creating a material issue that were not mentioned in the
26 statement of material facts because this is not required by the
Local Rules or Ninth Circuit law. More importantly, the Court
permitted Plaintiffs additional time and specifically directed
Plaintiffs to file a responsive statement of material facts
incorporating all material facts.

1 **D. Qualified Immunity**

2 The qualified immunity begins with the "threshold question:
3 Taken in the light most favorable to the party asserting the injury,
4 do the facts alleged show the conduct violated a constitutional
5 right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150
6 L.Ed.2d 272 (2001). "[I]f a violation could be made out on a
7 favorable view of the parties' submissions, the next, sequential step
8 is to ask whether the right was clearly established." *Id.* at 201, 121
9 S.Ct. at 2156. "It is important to emphasize that this inquiry must
10 be undertaken in light of the specific context of the case, not as a
11 broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 125
12 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004).⁴

13 Plaintiffs have not cited any authority showing they have a
14 "clearly established" right with respect to any of the allegations of
15 wrongful conduct by the Defendants. Plaintiffs' allegations that Mrs.
16 Covert was told the State was on a "witch hunt" is insufficient to
17 defeat summary judgment because it fails to show a "clearly
18 established" constitutionally right has been implicated. Further,
19 Plaintiffs have not shown how the Defendants' failure to investigate
20 nonspecific information about T.C.'s relative placement violated
21 Plaintiffs' constitutional rights. Plaintiffs' memorandum only states
22 in general terms that the Defendants violated Plaintiffs'
23 constitutionally protected liberty interest as parents in the custody
24 and care of their children and in the companionship and society of

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26 ⁴ Plaintiffs' memorandum cites the wrong law with respect to
the qualified immunity analysis.

1 their children. Plaintiffs rely on *Kelson v. City of Springfield*, 767
2 F.2d 651, 655 (9th Cir. 1985) to support this argument. *Kelson* held
3 that a parent has a constitutionally protected liberty interest in the
4 companionship and society of his child and that the state's
5 interference in that right without due process of law is remedial
6 under section 1983. *Id.* However, here, Plaintiffs are not
7 challenging the removal of their children from their home and they are
8 not arguing that their children were removed from their home without
9 due process. Rather, Plaintiffs argue that the Defendants' decisions
10 with respect to the Covert children after they were placed in the
11 custody of the State violated Plaintiffs' constitutionally protected
12 interest in their children. Therefore, *Kelson* is inapplicable to the
13 present case.

14 Plaintiffs' have not shown that a clearly established
15 constitutional right was violated by Defendants. Moreover, Plaintiffs
16 have not shown or alleged which specific defendants violated that
17 right. This is insufficient to survive summary judgment on qualified
18 immunity. Therefore, Defendants' motion for summary judgment is
19 granted on this basis. Because the Defendants' motion for summary
20 judgment is resolved on the issue of qualified immunity, the Court
21 does not consider Defendants' argument that Plaintiffs' claims are
22 barred by the applicable statute of limitations. Accordingly,

23 **IT IS HEREBY ORDERED:**

24 1. Plaintiffs' Motion to Strike Defendants' Reply Statement of
25 Material Facts and Supporting Affidavits, **Ct. Rec. 107**, is **DENIED**
26 because both the Court's previous Order and the Local Rules clearly

1 permit such a reply statement by Defendants.

2 2. Defendants' Motion for Summary Judgment, **Ct. Rec. 24**, is
3 **GRANTED** as indicated in this Order.

4 **IT IS SO ORDERED.** The District Court Executive is hereby
5 directed to enter this Order, furnish copies to counsel, and **CLOSE THE**
6 **FILE.**

7 **DATED** this 1st day of November, 2005.

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9 s/ Fred Van Sickle
Fred Van Sickle
10 United States District Judge
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